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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-361

UNITED STATES OF AMERICA, *Petitioner*

v.

ARTHUR C. SCHMID, JR.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Respondent opposes Petitioner's Petition for a Writ of Certiorari to the United States Court of Claims and respectfully asks for the dismissal of such petition.

QUESTION PRESENTED

Whether the provision of 10 U.S.C. § 687(a)

> "(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded;"

applies to the provisions of 10 U.S.C. § 687(a) establishing the requirement for eligibility to receive a readjustment payment that a member must have "completed, immediately before his release, at least five years of continuous active duty".

STATUTE INVOLVED

10 U.S.C. § 687(a) provides, in pertinent part, as follows:

> "Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. * * * For the purposes of this subsection—
>
> (1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of

> a year that is less than six months is disregarded."

Attention of this Honorable Court is directed to the fact that in its Petition for a Writ of Certiorari, the Petitioner has once again misquoted the statute involved. In the last sentence of the first paragraph above the word *purposes* (plural) is incorrectly quoted by petitioner as *purpose* (singular). This is the second time in this case in which Petitioner has incorrectly quoted this same word, the first time being on page 2 of its Opposition to Plaintiff's Motion for Summary Judgment. The fact that the word *purposes* is plural in the statute is highly significant since the essence of this case is really whether subsection (2) should be applied in determining one's eligibility for readjustment payment under § 687(a) or only subsection (1), dealing with the method of computation, as petitioner contends.

By pointing to the language previously contained in what is now 10 U.S.C. § 687(a) the Petitioner seeks to evade the clear language of that section which sustains plaintiff's eligibility for readjustment payment. Implicit in Petitioner's position is the recognition that Section 687(a) on its face provides that respondent has fulfilled the requirement of five years of continuous active duty by serving four (4) years, six (6) months and twenty-seven (27) days because of the definition of a year contained in subsection 2 of that section. That subsection provides:

> "For the purposes of this subsection * * *
>
> (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded."

The United States Court of Claims in its decision in this case by a six to one majority stated:

> "We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. * * * The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year." 436 F.2d 987, 989

In spite of the fact that it found no ambiguity in the statute, the Court of Claims went on to consider the legislative history of the Act in some detail. Following this consideration, it came to the conclusion that the legislative history itself gave "a strong indication that the intent of Congress was in accord with the statute's plain meaning." *Id.* at 990.

The Petitioner has urged that the administrative interpretation of the Act by the various branches of the Armed Services is inconsistent with the respondent's position. This argument, too, was considered and rejected by the Court of Claims inasmuch as such interpretation is inconsistent with both the statutory words and the legislative history.

A new argument has been advanced in this Petition on a topic not previously mentioned by Petitioner in any of its prior pleadings. It states that if allowed to stand, this decision will subject the United States to an estimated potential liability of more than $12,000,000. Since there is no information on this subject in the record, Respondent is at a loss to gauge the accuracy of this statement. In any event, consideration of this point is clearly irrelevant since the matter at issue concerns only the readjustment payment sought by respondent in the amount of $13,554.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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